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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRYL ANDREW WHITE,

Defendant and Appellant.

E057159

(Super.Ct.No. SWF1100947)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge.
Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Anthony Da Silva and Peter Quon,
Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Darryl White, directed 10- or 11-year old Jane Doe to suck his finger on multiple occasions, asked her to suck his balls on one occasion, and rubbed her buttocks and breasts on other occasions. Defendant also gave Jane Doe alcohol to drink, as well as suspected Ecstasy pills, on some occasions. On one occasion, Jane Doe made a noise in an attempt to wake her aunt, defendant's girlfriend, who, along with defendant, was Jane Doe's appointed guardian. To prevent Jane Doe from making noise, defendant choked the girl. After a jury trial, defendant was found guilty of four counts of lewd acts on a child under 14 (Pen. Code, § 299, subd. (a)), and one misdemeanor count of assault. (Pen. Code, § 240). Defendant was sentenced to an aggregate sentence of eight years in state prison and appealed.

On appeal, defendant challenges a ruling by the trial court admitting a photograph that was taken with defendant's cellular telephone on the grounds there was no foundation establishing defendant took the photograph, and the probative value of the photographic evidence was outweighed by the potential for prejudice, within the meaning of Evidence Code section 352. We affirm.

BACKGROUND

Defendant, age 28, lived with D.P. Jane Doe is D.P.'s niece, who had been in foster care. Jane Doe had lived with defendant and D.P. since she was seven years old.

In December 2010, when Jane Doe was 10 years old, as she was reading out loud from a dinosaur book, defendant became angry because she stumbled on some words. Jane Doe was in the garage doing laundry while reading. Defendant grabbed a beer from the kitchen, brought it into the garage, and told Jane Doe to drink it. Then defendant told Jane Doe to suck his finger, and she complied. Defendant told her not to look at him as she sucked his finger. Defendant made Jane Doe suck his fingers on more than one occasion. He also gave her orange pills to take, which may have been Ecstasy. Defendant told Jane Doe not to tell her aunt.

The next incident occurred after Christmas, and after Jane Doe turned 11. On this occasion, Jane Doe and her aunt came home after bowling. Defendant was out at a friend's house, so Jane Doe and her aunt went to bed. When defendant returned home, he woke Jane Doe up and told her to come out of her room and to go into the living room. He then instructed Jane Doe to lie on floor, and then he sat down near her. Defendant gave her some sort of soda or juice mixed with beer to drink. Defendant pulled his genitals from his shorts and told her to suck his balls.¹ Jane Doe's head was near where his privates were exposed, and he pushed her head down. Jane Doe pulled her head away and started crying. Defendant became angry and sent her to bed.

On another occasion, defendant woke Jane Doe up after both she and her aunt had gone to sleep. Defendant directed Jane Doe to come into the hallway, so he would be

¹ In the interview conducted by the Riverside Child Assessment Team (RCAT), Jane Doe stated she had seen defendant's genitals during the incident; however, at trial, Jane Doe stated that this was not true and that she never saw his penis.

able to hear in the event her aunt moved. In the hallway, defendant pulled up her top and rubbed Jane Doe's breasts. When he heard the aunt move, defendant pushed Jane Doe into her room and checked to see if the aunt was awake. Jane Doe pulled her shirt down, causing defendant to become angry, telling her he was not done. Defendant resumed rubbing Jane Doe's breasts, but she started crying, so he sent her back to her room.

In February 2011, Jane Doe came out of her room at night to throw something away or to get something, while defendant was in the living room. Jane Doe asked if she could go to bed. Defendant turned off the television and grabbed Jane Doe, as she tried to go to her room. Defendant then started rubbing her butt. Jane Doe tried to hit something, to make noise, to waken her aunt, who was sleeping. Defendant then tried to choke her and told her not to make any noise. Then Jane Doe went back to her room because he was angry.

The next incident occurred on March 10, 2011, when Jane Doe was 11 years old. Jane Doe, her aunt, and others went to Sharkey's, a pizza parlor and karaoke place. Jane Doe's friend, who lived next door to Jane Doe, had to be home by 8:30 p.m., so defendant and Jane Doe left at 8:00 p.m. to take her home, while the aunt remained at Sharkey's. After they dropped the friend off, defendant and Jane Doe went to their home where defendant instructed Jane Doe to feed the dogs, and gave her several cups of an alcoholic beverage called Joose to drink.² Jane Does' stomach began to hurt, but they returned to Sharkey's, where Jane Doe's aunt was still with the group.

² This beverage contains malt liquor.

On the way back to Sharkey's, defendant drove while Jane Doe sat in the back seat. Defendant told Jane Doe to move up to the front seat, which she did, and then he told her to suck his finger. After Jane Doe sucked his finger for about six minutes, he told her to get back into the rear seat because they were getting close to Sharkey's. They returned to the restaurant near closing time, 10:00 p.m. When they returned to Sharkey's, Jane Doe sat with her aunt. Jane Doe complained about her stomach, and her aunt, thinking she may not have gotten enough to eat, suggested that Jane eat some pizza to feel better. Then they went home, and Jane Doe went to bed.

That same night, defendant woke Jane Doe up, and summoned her into the hallway. Defendant told her to suck his finger. After sucking his finger for a few minutes, Jane Doe returned to bed.

On March 11, 2011, the day after the Sharkey's event, Jane Doe decided to tell her aunt that defendant had been touching her inappropriately because she did not want it to happen anymore. She made the disclosure after school. Later, Jane Doe was interviewed by the RCAT, and the interview was videotaped.

Subsequently, a Riverside Sheriff's Department investigator interviewed defendant. During the interview, the investigator told defendant his DNA had been found on the victim, although that was not true. Defendant initially denied any inappropriate contact with Jane Doe, attributing the presence of his epithelial cells to a spanking incident, and an occasion when he put her back to bed after she sleepwalked. However,

eventually, after the investigator explained what “groping” was, he admitted he “copped” a few feels.

Defendant was charged with three counts of lewd acts with a person under the age of 14 (Pen. Code, § 288, subd. (a), counts 1, 4, 5), one count of attempted lewd acts (Pen. Code, §§ 664 & 288, subd. (a), count 2), one count of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1), count 3), and one count of inducing a minor to consume liquor, a misdemeanor (Pen. Code, § 272, subd. (a)(1), count 6).³

Defendant was tried by a jury. He testified in his own defense, denying that he touched Jane Doe in an inappropriate manner or asked her to suck his fingers. He denied ever giving her any alcoholic beverages to drink, or any pills to ingest. He explained that when he admitted to the investigator that he had groped Jane Doe he did not understand what groping mean, despite the investigator’s explanation. Additionally, he trusted the investigator and thought she wanted to help him, so he told her what he thought she wanted to hear.

The jury convicted defendant as charged in counts 1, 2, 4, and 5. The jury found defendant not guilty of the aggravated assault charged in count 3, but found him guilty of assault, a misdemeanor, as a lesser offense. Defendant was sentenced to an aggravated term of eight years in state prison, and appealed.

³ Count 6 was dismissed on the People’s motion.

DISCUSSION

a. *Introduction*

During the trial, the People offered into evidence, Exhibit 5, a photograph obtained by D.P. that had been obtained from a T-Mobile website gallery of photographs from defendant's cell phone. The photograph, taken in 2008, depicted a 17 year-old niece of D.P.'s (*not* Jane Doe). She was lying asleep on a couch, clothed, but the angle of the photograph focused on the buttock area of the individual.⁴ D.P. had accessed the couple's T-Mobile account to pay the bill and discovered the photograph in a gallery of pictures saved to the account related to defendant's cell phone.

Defendant objected on the grounds that (a) there was inadequate foundation to establish that defendant took the photograph, and (b) that any probative value of the photograph was outweighed by prejudice. (Evid. Code, § 352.) The court overruled the objection and allowed the People to publish the photograph to the jury. Subsequently, the defendant sought to clarify if the court was ruling that the photograph was admissible under Evidence Code section 1101, subdivision (b). The court acknowledged it had not specified a code section under which the exhibit was admissible, but it concluded the evidence was relevant and admissible, there were no section 352 problems, and the evidence had already been presented. When the defendant pressed the court for a statutory basis for admission of the evidence, the court explained that no one argued a specific basis so it had not ruled on one.

⁴ We have reviewed the exhibit in question.

The defendant again objected on the ground the People were attempting to use the photograph to show propensity, but the evidence did not meet the criteria of Evidence Code, section 1108. After pressing the matter further, the People argued the photograph was offered to show lack of mistake and intent, not propensity. The ruling was not changed.

On appeal, defendant argues that the admission of the photograph was error, insofar as it was not relevant and was more prejudicial than probative. We review the trial court's rulings on the admission of evidence for abuse of discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 859.) We conclude that any error was harmless.

The admissibility of photographs is governed by the same rules of evidence used to determine the admissibility of evidence generally: only relevant evidence is admissible. (Evid. Code, § 350; *People v. Lewis* (2001) 25 Cal.4th 610, 641.) The standard to be applied by the trial court in ruling upon the admissibility of photographs is whether they fairly depict that which they purport to portray. (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891-892.) In addition, because a photograph is a "writing," authentication is required before it may be received in evidence. (Evid. Code, §§ 250, 1401, subd. (a); *People v. Beckley* (2010) 185 Cal.App.4th 509, 514 (*Beckley*).) Such evidence may be authenticated by the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is. (Evid. Code, §1400; *Beckley*, at p. 515.) Once a proper foundation has been laid, admission of the evidence is within the sound discretion of the trial court. (*People v. Roldan* (2005) 35

Cal.4th 646, 708, overruled on a different ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. (Evid. Code, § 1553, subd. (a).) Otherwise, the testimony of a person who was present at the time a film (or a photograph) was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence. (*People v. Bowley* (1963) 59 Cal.2d 855, 859; see also, *People v. Williams* (1997) 16 Cal.4th 635, 662.) However, the fact that an image may be what it purports to represent does not necessarily establish how or by whom the image was obtained.

The fact that the court permits a writing to be admitted into evidence does not necessarily establish the authentication of the writing, only that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434-1435 (*Valdez*).) Like other material facts, the authenticity of a writing or document may be established by circumstantial evidence. (*Valdez*, at p. 1435.)

In *Valdez*, the defendant argued for reversal of his convictions for attempted murder, assault with a firearm, and street terrorism on the ground that printouts of his MySpace social media Internet page had not been authenticated. The reviewing court disagreed, because the defendant did not dispute that the MySpace page icon identifying the owner of the page displayed defendant's face, and other material on the page pointed

to the defendant as the owner of the page. (*Valdez, supra*, 201 Cal.App.4th at p. 1435.)

The court observed that while defendant was free to argue otherwise to the jury, a reasonable trier of fact could conclude from the posting of personal photographs, communications, and other details that the MySpace page belonged to him. (*Ibid.*)

In holding that the trial court did not err, the appellate court noted that particular items on the page, including a photograph of defendant forming a gang signal with his hand, met the threshold for the jury to determine authenticity. (*Valdez, supra*, 201 Cal.App.4th at p. 1436.) The court observed, “The contents of a document may authenticate it.” (*Ibid.*)

In reaching its conclusion, the reviewing court in *Valdez* distinguished the facts of the case before it from those in *Beckley, supra*, 185 Cal.App.4th at page 509. (*Valdez, supra*, 201 Cal.App.4th at p. 1436.) In *Beckley*, the prosecution offered a photograph downloaded from a MySpace page, which purported to show the girlfriend of one of the defendants flashing a gang sign, to rebut her testimony that she did not associate with a gang. The trial court admitted the photograph over defendant’s objection that it had not been authenticated.

The reviewing court agreed that the court erred in admitting the photograph, given that software programs facilitate the adulteration of images, and the fact that websites are vulnerable to hacking. (*Beckley, supra*, 185 Cal.App.4th at pp. 515-516.) Nevertheless, the reviewing court concluded the evidence was harmless, because the defendant’s active

membership was not subject to reasonable doubt, and an eyewitness identified him as the shooter. (*Id.* at p. 516.)

Here, the court presumed that defendant had taken the photograph based on the fact that the photograph was taken using defendant's cell phone camera and was saved in his cell phone account records. Yet, the niece depicted in the photograph had come to spend the night over the holidays along with other cousins, and D.P. did not know for sure who took the photographs, although others do not usually have defendant's phone. D.P. testified there were several other photographs taken in the same group that appeared to be accidental photographs; defendant denied taking the photographs.

Although one might infer that photographs on a person's cell phone, saved to his or her cell phone account, were taken by the person who possessed the cell phone, that is not always the case, as the court acknowledged.⁵ To the extent the photograph was offered by the People to show defendant's lewd or prurient intent, it was important to prove that he took the photographs, and not someone else. That was not established here.

Reversal is not required, however. The photograph itself is not suggestive, it depicts a person who was older than 14, and had been taken at least three or four years prior to the time of the current offenses. It was not overly inflammatory or so prejudicial as to require reversal. (Evid. Code, § 352; see *People v. Harris* (2013) 57 Cal.4th 804, 842 [admission of other crimes evidence relating to burglaries in a capital case did not

⁵ Apparently, simply pressing a "save" button on the phone would upload photographs to the online account gallery.

violate Evidence Code section 352 where the facts of the burglaries were not particularly inflammatory compared to the current victim's rape and murder]; see also, *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [evidence of prior molestations not any more inflammatory than the evidence of the current molestations]; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614 [evidence of prior assaults and marital discord properly admitted where the prior assaults were no stronger and no more inflammatory than the testimony concerning the charged offense].)

Further, there was substantial evidence to support the conviction even without the photograph, including Jane Doe's testimony and defendant's incriminating statements to the detective prior to his arrest. We cannot say that a different result would have been obtained without the error, or that the admission of the evidence gave rise to a miscarriage of justice. (See, Cal. Const., art. VI, § 13.) Any error in admitting the photographic evidence was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.